UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO
Respondent

and

Cases 12-CA-218502
12-CA-232704

UNION INTERNACIONAL DE TRABAJADORES DE LA INDUSTRIA DE AUTOMOVILES, AEROESPACIO E IMPLEMENTOS AGRICOLAS, U.A.W., LOCAL 1850
Charging Party

Manijee Ashrafi-Negroni, Esq.
for the General Counsel.
Carolina Santa Cruz-Sadurni and Fernando A. Baerga-Ibañez, Esqs.,
for the Respondent.
Alexandra Sanchez-Mitchell and Miguel Simonet-Sierra, Esqs.
for the Charging Party

DECISION

SHARON LEVINSON STECKLER, Administrative Law Judge. These cases involve the Respondent employer's reduction in Christmas bonuses for two consecutive years while the parties negotiated a successor collective-bargaining agreement. I find that Respondent unlawfully reduced the Christmas bonuses twice.

STATEMENT OF THE CASE

This case is before me on a stipulated record. Charging Party Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W., Local 1850 (the Union), filed charge 12-CA-218502 on April 16, 2018,[1] and filed an amended charge on June 19, 2018, against Asociacion de Empleados del Estado Libre Asociado de Puerto Rico (Respondent). General Counsel issued a Complaint and Notice of Hearing on August 31, 2018. The Union subsequently filed charge 12-CA-232704 on December 13, 2018 and an amended charge on March 4, 2019. General Counsel issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (complaint) on February 27, 2019. Respondent filed timely answers.

[1] The charge itself is dated April 11, 2016 without filling in the date filed; the Region's date of service is April 16, 2018. (GC Exh. 1(a)-(b)).

On August 9, 2019 the parties submitted a Joint Motion and Stipulation of Facts, requesting that I decide the matter based upon a stipulated record and therefore waiving their rights to examine and cross-examine witnesses. The parties twice requested extensions to submit translated exhibits, which were received on September 11, 2019. The parties submitted briefs on October 16, 2019.

Upon the entire record[2] and after carefully considering the parties' respective briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent admits, and I find, it has been a Puerto Rico corporation with an office and place of business in San Juan, Puerto Rico (Respondent's facility), and has been engaged in providing savings and loan services, insurances and related financial services to its members. During the past 12 month, Respondent, in conducting its business operations described above, derives gross revenues valued in excess of $500,000 and purchased and received at its San Juan, Puerto Rico facility, goods valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act. (Stip. ¶¶2-3)

The parties admit, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE PARTIES' HISTORY OF LABOR RELATIONS

Since at least 1992, based upon Section 9(a) of the Act, the Union has been the collective bargaining representative of the following unit, which is appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All office, skilled office and maintenance employees and employees used to perform repairs at Respondent's building in its place of business at Hato Rey, or any other place on the Island of Puerto Rico, including Playa Santa del Caribe; excluding all professionals, executives, administrators, the executive director's driver, confidential employees, guards and supervisors as defined in the Act, , the secretaries for the executive director, the secretary of the assistant executive director, the secretary for the director of finance, the secretary of the planning and budget director, the secretary of the personnel and industrial relations director, the secretary of the legal affairs office director, a secretary for each assistant to the executive director up to a maximum of four secretaries, a secretary for each division by which the executive director carries out his functions, up to a maximum of four secretaries, the auditor's secretary and the secretary of the regional services director.

(Stip. ¶¶8-9).

[2] The following abbreviations are used: "Stip." For Joint Motion and Stipulation of Facts and Documents, "GC Exh." for General Counsel exhibits, "Jt. Exh." for Joint Exhibits, "GC Br." for General Counsel brief, "R. Br." for Respondent brief, and "U Br." for Charging Party brief.

Over the years, Respondent and the Union entered into several successive collective-bargaining agreements, the most recent of which was in effect from July 1, 2013 through June 30, 2017. After the most recent collective-bargaining agreement expired, the parties extended the collective-bargaining agreement in successive period through the remainder of 2017 and 2018, except for November 1, 2017 through December 20, 2017. (Stip. ¶¶14-15; Jt. Exh. 5.) Throughout negotiations, Respondent never contended any inability to pay or financial difficulties that precluded paying economic benefits to employees. (Stip. ¶20.)

III. THE CHRISTMAS BONUSES

From 2002 through 2016, annual Christmas bonuses were encompassed in Article 41 of the collective-bargaining agreements and Respondent paid accordingly. Before the 2013-2017 contract, the percent of 8.50% of various salaries and Respondent determined the amount of the bonus as a stated percentage of an employee's annual earnings, up to a maximum specified in the collective-bargaining agreement. The specific language of the 2013-2017 collective-bargaining agreement, similar to the previous contracts, states:

> The Association will grant the Christmas Bonus as provided in Law No. 148 of June 30, 1969, as amended, with the modification:
>
> Eight point sixty percent (8.60%) of the salaries earned up to a maximum or $37,000 in 2013;
> Eight point sixty percent (8.60%) of the salaries earned up to a maximum of $38,000 in 2014;
> Eight point sixty-five percent (8.65%) of the salaries earned up to a maximum of $39,000 in 2015;
> Eight point sixty-five percent (8.65%) of the salaries earned up to a maximum of $40,000 in 2016.
>
> Salaries to be considered shall be the one earned between October 1st of the previous year and September 30th of the year corresponding to the bonus.

The following table reflects the collective-bargaining agreements, and the percentage of the salary to be paid to the maximum salary.

Contract Years and Contract Section	**Percentage Amount to be Paid**	**Up to Maximum Salary of:**	**Based upon Year Starting and Ending**
2002-2005 Art. 41 (Jt. Exh. 1)	8.5%	$30,000.00	October 1, of year before and ending September 30 of year corresponding with bonus
2006-2009 Art. 41 (Jt. Exh. 2)	8.5%	$32,000 for years 2005-2006; $33,000 for year 2007; $34,000 for year 2008	October 1, of year before and ending September 30 of year corresponding with bonus

Contract Years and Contract Section	Percentage Amount to be Paid	Up to Maximum Salary of:	Based upon Year Starting and Ending
2009-2013 Art. 41 (Jt. Exh. 3)	8.5%	$34,000 for year 2009; $35,000 for year 2010; $36,000 for year 2011; $37,000 for year 2012	October 1, of year before and ending September 30 of year corresponding with bonus
2013-2017 and extensions Art. 41 (Jt. Exh. 4)	8.60% for 2013 8.60% for 2014 8.65% for 2015 8.65% for 2016	$37,000 in 2013 $38,000 in 2014 $39,000 in 2015 $40,000 in 2016	October 1, of year before and ending September 30 of year corresponding with bonus

In 2016, each employee received Christmas bonus pay (gross amount) between $437.06 and $3460.00. In total, employees, received $651.843.47. (Jt. Exh. 6(b).)

The law referred to in the contract is in Puerto Rico statutes. The law provides that employees are entitled to a small Christmas bonus. However, according to 29 L.P.R.A. §506, the statutory provisions do not apply when employees are covered by a collective agreement, "except in the event where the amount of the bonus to which entitled by such collective agreement may result lower than the one provided by this chapter in which case they shall receive the necessary amount to complete the bonus provided hereby."

The collective-bargaining agreement also includes a "zipper" clause, Article 53, entitled "Validity":

> This Collective Bargaining Agreement shall be in effect from July 1, 2013 until June 30, 2017 and subsequently from year to year, unless one party notifies the other (party) in writing, by certified mail with acknowledgement of receipt, within sixty (60) days prior to June 30, 2017, or any other subsequent anniversary date, whichever the case, of its intention to end it or modify it through the negotiation of a new Collective Bargaining Agreement. If any clause of this Collective Bargaining Agreement provides any specific term, that shall prevail over the term that is provided herein.

(Jt. Exh. 4(b), p. 51.)

After the collective-bargaining agreement expired, the parties agreed to extensions until October 31, 2017, then December 21, 2017 through January 31, 2019. (Stip. ¶14.)

IV. IN 2017 AND 2018 RESPONDENT REDUCES THE CHRISTMAS BONUS PAYMENTS

On November 29, 2017, Respondent's counsel sent a letter about negotiations, which included a proposed Christmas bonus. Respondent notified "all unionized personnel," on December 1, 2017 of a proposed increased in the Christmas bonus, among other items, and that the negotiations were continuing. (Stip. ¶24; Jt. Exh. 10(b).) On December 5, 2017, the Union

accepted Respondent's proposed Christmas bonus of 8.65% of salary to a maximum of $40,000 for years 2017 and 2018. (Jt. Exhs. 11(b), 12(b).) That term was reiterated and then Respondent attached a condition to the Christmas bonus---subject to acceptance of the extending the contract until June 30, 2019 and certain salary provisions. (Jt. Exh. 15(b).) The parties did not extend the contract or complete negotiations.

Despite traditionally paying the Christmas bonus the day before Thanksgiving, Respondent waited to pay employees on December 15, 2017. For the 2017 Christmas bonus, Respondent significantly reduced the Christmas bonus from previous years and paid almost every bargaining unit employee a gross amount of $600.00. The employees, in total, received a gross amount of $127,924.44. (Stip. ¶30; Jt. Exh. 16(b).)[3]

Throughout 2018, the parties continued negotiations during the contract extension. They did not reach an agreement for a successor contract. On November 15, 2018, Local 1850 President Delgado, by letter, requested Respondent to pay the Christmas bonus as historically paid, "on Thanksgiving Eve," or November 21, 2018, in order to permit employees to make purchases for Thanksgiving and Christmas. Delgado cited the contract language requiring the amount as 8.65% of the wages, up to the maximum of $40,000. (Jt. Exh. 31(b).)

On November 20, 2018, Respondent, by letter, notified Delgado:

> As you know, beyond the applicable law, the payment of the Christmas Bonus is a matter of collective bargaining. Therefore, your request does not proceed until the parties can reach an agreement.
>
> I trust in good faith, so that the parties can reach the necessary agreements to end collective bargaining.

(Jt. Exh. 32(b)).

The parties met in negotiations on November 26 and December 12. The parties agreed to extend the collective bargaining agreement "except in the salary article" through January 10, or until the parties signed an agreement, whichever came first. Respondent proposed to keep the same Christmas bonus language in the successor contract. (Jt. Exh. 34(b).)

By November 30, 2018, the parties remained in negotiations, with tentative agreements in certain areas, but no agreements in wages or the Christmas bonus. (Stip. ¶¶52-53.) On December 15, 2018, Respondent paid to employees a maximum Christmas bonus of $600.00 gross pay instead of the formula stated in the extended collective-bargaining agreement. (Stip. ¶¶50-51; Jt. Exh. 36(b).)

V. RESPONDENT'S INFORMATIVE MOTION

When it filed its brief, Respondent also filed a motion stating that it declared impasse on September 5, 2019 and it paid the difference required to employees for the 2018 Christmas bonus. General Counsel's response stated that Respondent disclosed this information but did not provide evidence to verify what was paid to each aggrieved employee, whether it paid the interest due,

[3] One received $409.02; another received $315.42. Approximately 210 employees received the 2016 bonus. (Jt. Exh. 16(b)).

and whether it paid the excess tax amounts. As a result, General Counsel said this matter was better left to the compliance phase. Respondent also did not state whether it posted anything to employees, notified the Union before it paid the Christmas bonuses and does not show with the Motion what amounts were paid.

I issued an Order to Show Cause in which Respondent, by November 1, 2019, was ordered to provide its position on why the additional information was relevant and provide argument on how it applied. The Order also provided General Counsel and the Union an opportunity to reply to Respondent's position by November 8, 2019. On November 1, 2019, Respondent withdrew its motion because General Counsel apparently did not stipulate to the proposed additional facts; Respondent stated, if necessary, the matter would be handled in the compliance phase.

ANALYSIS

I. THE PARTIES' POSITIONS

A. General Counsel

Respondent's failure to pay the 2017 bonus contradicts past practice and successor contract proposals Respondent made to maintain the 2016 bonus formula. (GC Br. at 2.) General Counsel cites *Richfield Hospitality, Inc.*, 368 NLRB No. 44 (2019), in which Respondent violated Section 8(a)(5) when it failed to maintain longevity pay increases post-contract expiration. Because the 2018 Christmas bonus was due during an extension of the collective-bargaining agreement, Respondent violated Section 8(a)(5) and 8(d) with a mid-term modification. General Counsel also points out that the contract coverage test does not yield a different result.

B. Union

Since at least 2006, Respondent paid the employees a Christmas bonus in accord with the terms of the collective-bargaining agreement. The collective-bargaining agreement was in effect during the week of Thanksgiving 2017, which coincided historically with the time Respondent paid the Christmas bonuses.

C. Respondent

Respondent contends that the collective-bargaining agreement's specific language limits payment of the Christmas bonuses to years 2013 through 2016, but nothing for years 2017 and 2018. Although the collective-bargaining agreement was extended, none of the extensions included modifications to the Christmas bonus amounts. (R. Br. at 6.) Respondent states no past practice existed because the contract term was no longer applicable, so P.R. Law 148 applied instead and paying the $600 per employee was appropriate for 2017 and 2018.

The agreement's language was clear and unmistakable. The parties did not agree on any bonuses for 2017 and 2018 and therefore Respondent is responsible only for the years stated in the agreement, which defines the status quo. Additionally, Respondent's interpretation of the language is reasonable and logical and the Board may not "determine which of two equally plausible contract interpretations is correct." (R. Br. at 2.)

II. THE CHRISTMAS BONUS IS A MANDATORY TERM AND CONDITION OF EMPLOYMENT

Changes to payment of wages are mandatory subjects of bargaining. *Strategic Resources, Inc.*, 364 NLRB No. 42, slip op. at 7-8 (2016). Bonuses, as payments to employees, are considered wages and therefore a mandatory subject of bargaining. *Lenawee Stamping Corp. d/b/a Kirchhoff Van-Robb*, 365 NLRB No. 97, slip op. at 1 fn. 2 and 8 (2017). A bonus is a term and condition of employment over which an employer must bargain when the bonus was paid regularly and was tied to employment-related factors. *Bob's Tire Co., Inc.*, 368 NLRB No. 33, slip op. at 1 (2019).

The Christmas bonuses were paid regularly and tied to employment-related factors. Regarding regular payment, the bonuses were paid each year, beginning with the 2002-2005 collective-bargaining agreement and continued each year thereafter. The formula to determine the bonus was applied annually at the same time. The Christmas bonus was tied to an employment-related factor: how much employees earned in a 12-month period, ending September 30 of the year in which the bonus was paid. Respondent had no discretion in when the bonus was calculated or the formula to be used because the collective-bargaining agreement stated the formula. *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC,* 368 NLRB No. 44, slip op. at 20 (2019). These factors demonstrate that the Christmas bonuses were terms and conditions of employment and a mandatory subject of bargaining. *Bob's Tire Co.*, supra; *Freedom WLNE-TV*, 278 NLRB 1293, 1296-1297 (1986) (Christmas bonus).[4]

III. IN 2017 AND 2018 RESPONDENT VIOLATED SECTION 8(A)(5) AND (1) BY FAILING TO PAY THE EMPLOYEES' CONTRACTUAL CHRISTMAS BONUS

A. In 2017 Respondent Unilaterally Changed the Paid Amount of Employees' Christmas Bonus

The Christmas bonus was a past practice and Respondent was obligated to maintain the past practice when the collective-bargaining agreement expired. Because the Christmas bonus was a past practice, Respondent had an obligation to notify the Union and bargaining over it before implementing the change and, in the meantime, had an obligation to maintain the Christmas bonus as the status quo. Applying contract coverage and waiver tests, Respondent still had an obligation to bargain before it implemented changes to the Christmas bonus.

1. The Christmas bonus was a past practice and Respondent was obliged to continue the status quo

During the period in which parties are negotiating a new collective-bargaining agreement and expiration of the old one, the status quo controls whether an employer may implement a unilateral change and is controlled by the substantive terms of the expired collective-bargaining agreement. *Wilkes-Barre Hospital Co., LLC v. NLRB*, 857 F.3d 364, 374, (D.C. Cir. 2017) citing, inter alia, *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562, 1567 (10th Cir. 1993). The terms of the expired collective-bargaining agreement remain the status quo of all mandatory subject of bargaining. *Richfield Hospitality, Inc. as Managing Agent for Kahler Hotels, LLC*, 368

[4] The amount of the change is not de minimis. For an employee who received a bonus of $3460 in 2016, the 2017 Christmas bonus was reduced by $2860, and then repeated in 2018. For these employees, the differences in the amounts of the bonus are not chump change. Therefore, the changes are material and substantial. See generally *SMI/Division of DCS-CHOL Enterprises, Inc.*, 365 NLRB No. 152 (2017) (employer's unilateral grant of $100 bonus violative).

NLRB No. 44, slip op. at 3 (2019). The party asserting the existence of a past practice, here the General Counsel, must establish the regularity and frequency specific to its circumstances. *General Die Casters, Inc*., 359 NLRB 89, 90 (2012); *North Star Steel Co*., 347 NLRB 1364, 1367 (2006).

A past practice must occur with such regularity and frequency that employees could reasonably expect the "practice" to continue or reoccur on a regular and consistent basis. *Philadelphia Coca-Cola Bottling Co*., 340 NLRB 349, 353-354 (2003), enfd. 112 Fed. Appx. 65 (D.C. Cir. 2004); *Eugene Iovine, Inc*., 328 NLRB 294, 297 (1999). A past practice that becomes a term and condition of employment cannot be changed without offering the collective-bargaining representative notice and an opportunity to bargain, absent clear and unequivocal waiver of this right. *Sunoco, Inc*., 349 NLRB 240, 244 (2007), citing *Granite City Steel Co*., 167 NLRB 310, 315 (1967); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001); *Exxon Shipping Co*., 291 NLRB 489, 493 (1988); *Queen Mary Rest. Corp. v. NLRB*, 560 F.2d 403, 408 (9th Cir. 1977).

While the parties are negotiating a collective-bargaining agreement, an employer must refrain from any implementing changes "'unless and until an overall impasse has been reached on bargaining for an agreement as a whole,' subject to certain exceptions." *Oberthur Technologies of America Corp*., 368 NLRB No. 5, slip op. at 2 fn. 7, citing *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir. 1994), and *RBE Electronics of S.D*., 320 NLRB 80, 81-82 (1995). The expired collective-bargaining agreement, with limited exceptions, remains the status quo, which an employer must maintain. *Intermountain Rural Electrical Ass'n v. NLRB*, 984 F.2d at 1568.

The Christmas bonus is indeed a past practice. *Freedom WLNE-TV*, 278 NLRB at 1299. There, the Board adopted the administrative law judge's analysis regarding a Christmas bonus withheld while the employer and union negotiated a successor collective bargaining agreement. Id. The formula was already known and was considered a pre-existing condition. Id. The condition survived contract expiration and the employer was required to bargain before making the decision to withhold the benefit. Id., citing *Struther Wells Corp*., 262 NLRB 1080, 1081 (1982).

Similarly, in *Intermountain Rural Ec. Ass'n*, 305 NLRB 783, 787-788 (1991), enfd. 984 F.2d 1562, reh'g denied (10th Cir. 1993), the parties were negotiating a successor contract after the previous contract expired. At issue was employer's alleged unilateral change of overtime premium pay calculation. The previous contract's language had changed, yet since that time --- over 7 years---the employer retained the same overtime pay calculation. As in the current situation, "[t]his uninterrupted and accepted custom had thus become an implied term and condition of employment by mutual consent of the parties." Id.

Here, General Counsel establishes the past practice, which existed since 2003 and forward. It was paid annually according to the terms of the collective-bargaining agreements. Although the percentage amount and the maximum salary amount changed with the successive bargaining agreements, Although the parties bargained about the bonuses during negotiations, the parties reached no agreement. Employees could expect the Christmas bonus to be paid according to the percent and maximums established in the collective-bargaining agreements, not the limits set by the Commonwealth's law.[5] Consistent with *Freedom WLNE-TV*, supra,

[5] Respondent does not raise a defense of either impasse or *Bottom Line* exceptions. The *Bottom Line* exceptions that permit an employer to implement changes are: when the union delays bargaining; and, when economic exigencies compel prompt action. *Bottom Line*, 302 NLRB at 374.

Respondent had an obligation to notify the Union and give it an opportunity to bargain over its intended change. In the meantime, Respondent was obligated to maintain the status quo of the expired collective-bargaining agreement.

2. Contract coverage and waiver tests

Respondent contends that, because the language of the expired agreement did not contain modification for year 2017, it had no obligation to continue the term according to the 2016 payment schedule and instead reverted to the terms of PR Law No. 148. (R. Br. at 10.) This argument is unavailing because of the law's exception for collective-bargaining agreements. Two cases discuss the Puerto Rican law establishing Christmas bonuses, which is cited within the language of Article 41, and its impact upon contractual provisions: *San Juan Bautista, Inc. d/b/a San Juan Bautista Medical Center*, 356 NLRB 736 (2011) and *Hospital San Carlos Borromeo*, 355 NLRB 153 (2010). Although both cases involved mid-term modifications, both relied upon exemptions from the Christmas bonus law. In both cases, the employers were not excused from the Christmas bonuses as stated in their respective collective-bargaining agreements. *Hospital San Carlos Borromeo*, 355 NLRB at 153. As in *Wilkes-Barre*, 857 F.3d at 375-376, the term of contract speaks only to contractual obligations and not the employees' statutory rights under the Act.

Wilkes-Barre, supra, also is instructive under a contract coverage test.[6] Similar to the present case, the collective-bargaining agreement expired. The employer withheld longevity pay increases. The agreement specified the years in which the raises were effective. 857 F.3d at 368-369. As in the case here, the parties had not bargaining to impasse and the employer did not notify the union of its intentions. Id. at 374. The employer argued that the longevity increases were limited to the term of the agreement and the durational clause did not change the courts conclusion. Id. at 377. Because the durational clause said the terms applied during the term of the agreement, the court found that the union's "statutory claim" survived and were limited to a time certain. Id. at 377.

The court then considered whether the union waived its rights. Waiver must be clear and unmistakable. Id. at 377. The court stated that neither the general contract provisions nor silence are sufficient to establish waiver. *Wilkes-Barre*, 857 F.3d at 378. To establish waiver, the employer would have to point out specific contractual language that ceded the union's statutory rights upon expiration. Id. As in the present case, nothing establishes such a waiver. The "zipper clause" in particular does not amount to a waiver. *Viejas Band of Kumeyayy Indians d/b/a Viejas Casino & Resort*, 366 NLRB No. 113, slip op. at 1 fn. 2 (2018).

3. Conclusion regarding the 2017 decrease in the Christmas bonus

Nothing in the stipulated facts shows that Respondent actually notified the Union that it intended to change the bonus payments other than that the parties were negotiating a new contract. The Union was presented with fait accompli because Respondent failed to give the Union advance notice of the change in the Christmas bonus. *Lenawee Stamping Corp.*, supra, slip op. at 9.

[6] The Board recently adopted the contract coverage test and determined to apply it retroactively. *MV Transportation, Inc.*, 368 NLRB No. 66 (2019).

B. In 2018 Respondent Unilaterally Changed the Amount of the Christmas Bonus

The 2018 failure to pay the Christmas bonus as provided in the agreement also violates Section 8(a)(5) and (1) and 8(d). As General Counsel contends, this change is a mid-term modification because the collective-bargaining agreement was in effect. The Board recently summarized the law of midterm contract modification:

> Section 8(a)(5) and (1) and Section 8(d) of the Act prohibit an employer from modifying terms and conditions of employment established by a collective-bargaining agreement during the agreement's term without the union's consent. See, e.g., *Knollwood Country Club*, 365 NLRB No. 22, slip op. at 2 (2017); *Oak Cliff-Golman Baking Co*., 207 NLRB 1063, 1063-1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975). When an employer defends against a midterm contract modification allegation by arguing that the contract did not prohibit the challenged action, the Board will not ordinarily find a violation if the employer's contractual interpretation has a ""sound arguable basis." *Bath Iron Works Corp*., 345 NLRB 499, 501-502 (2005), enfd. sub nom. *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007).[ ] It is well settled Board law that "[i]n interpreting a collective bargaining agreement to evaluate the basis of an employer's contractual defense, the Board gives controlling weight to the parties' actual intent underlying the contractual language in question" and "examines 'both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself.'" *Knollwood Country Club*, above, slip op. at 3 (quoting *Mining Specialists, Inc*., 314 NLRB 268, 268-269 (1994)).[ ]

Pacific Maritime Assn., 367 NLRB No. 121 (2019) [footnotes omitted]. Also see *San Juan Bautista*, supra, and *Hospital San Carlos Borromeo,* supra.

I disagree that Respondent articulates a sound arguable basis for the modification. Respondent contends that none of the extensions included any language to provide the Christmas bonus beyond 2016. (R.Br. at 6.) Article 53, Validity, specifically states the agreement's terms would continue unless otherwise provided and the specific term prevailed. As the parties agreed to an extension and the Validity section continues the terms and conditions, the Christmas bonus section survives with the entire collective-bargaining agreement. Further, the contract coverage analysis above reflects that the contract continued without a specific restriction and additionally did not waive the Union's statutory rights. Respondent does not point out anything indicating that the payments would not continue should the parties agree to a contract extension. Even if it was not a contractual condition, it certainly was a past practice, as already established.[7] I therefore find that Respondent violated the Act by reducing the Christmas bonuses due to the employees.

[7] Respondent's Informational Motion indicates that Respondent believes it now paid the 2018 bonus in full to employees. Even if Respondent had not withdrawn its Informational Motion, Respondent did not provide sufficient information to show that this matter is resolved or that it repudiated its conduct. Respondent would need to meet the long-standing requirements in *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978). Those requirements are a timely and unambiguous repudiation, specific to the coercive conduct and "'free from other proscribed illegal conduct.'" Id. at 138, citing *Douglas Division, The Scott & Fetzer Co*., 228 NLRB 1016 (1977). Respondent must provide adequate publication of the repudiation to the employees and no proscribed conduct on the employer's part after publication. In addition, Respondent must include assurances to employees that in the future it will not interfere with the employees' Section 7 rights. *Passavant*, 237 NLRB at 128-139. Respondent

CONCLUSIONS OF LAW

1. Respondent Asociacion de Empleados del Estado Libre Asociado de Puerto Rico is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. Charging Party Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W., Local 1850 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times, the following individuals held positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents within the meaning of Section 2(13) of the Act:

Pablo Cresp Claudio	Executive Director
Pier A. Vargas-Luque	Acting Director, Human Resources and Labor Relations

4. Since at least March 1992, the following employees of the Respondent have been exclusively represented by the Union, based upon Section 9(a) of the Act, and constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All office, skilled office and maintenance employees and employees used to perform repairs at Respondent's building in its place of business at Hato Rey, or any other place on the Island of Puerto Rico, including Playa Santa del Caribe; excluding all professionals, executives, administrators, the executive director's driver, confidential employees, guards and supervisors as defined in the Act, the secretaries for the executive director, the secretary of the assistant executive director, the secretary for the director of finance, the secretary of the planning and budget director, the secretary of the personnel and industrial relations director, the secretary of the legal affairs office director, a secretary for each assistant to the executive director up to a maximum of four secretaries, a secretary for each division by which the executive director carries out his functions, up to a maximum of four secretaries, the auditor's secretary and the secretary of the regional services director.

5. About November 2017, Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing Christmas bonus pay and failing to follow the contractual rate established as past practice.

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provided no evidence of a notice posting. Respondent did not make a timely repudiation, as it waited from November 2018 until approximately October 2019 (11 months) to pay the employees. Respondent also is not free from other unlawful conduct, as I find the withholding of the required 2017 Christmas bonus is not yet remedied. Further, Respondent does not make clear whether the allegedly paid 2018 Christmas bonus was according to the terms of the 2013-2016 agreement or the implemented agreement. In short, I would have found that Respondent did not fully remediate its unlawful conduct. *A.S.V., Inc. a/k/a Terex*, 366 NLRB No. 162, slip op. 1, fn.1 (2018); *Tower Automotive, Inc.*, 326 NLRB 1358 (1998).

6. About November 2018, Respondent violation Section 8(a)(5) and (1) and 8(d) of the Act by making a mid-term modification of the collective-bargaining agreement, unilaterally changing Christmas bonus amount and failing to follow the contractual rate.

7. The above unfair labor practices affect commerce within the meaning of 2(6) and (7) of the Act.

REMEDY

Having found Respondent engaged in unfair labor practices, I shall order it to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Because Respondent violated Section 8(a)(5) and (1) by changing the terms and conditions of employment of its unit employees without giving the Union an opportunity to bargain, I shall order the Respondent to rescind the unlawful unilateral changes it made, upon request from the Union. Respondent also must make unit employees whole for any loss of earnings and other benefits attributable to its unlawful unilateral changes in the 2017 and 2018 Christmas bonuses. *Viejas Band,* supra; *Hospital Santa Rosa Inc. a/k/a Clinica Santa Rosa*, 365 NLRB No. 5, slip op. at 1-2. In this regard, backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent must compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 1-2 (2016).[8]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

ORDER

1. Cease and desist from:

(a) Failing and refusing to bargain with Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W., Local 1850 (the Union) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

(b) Unilaterally changing terms and condition of employment of its unit employees, including reducing Christmas bonus pay, without first notifying the Union and giving it an opportunity to bargain.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[8] Compliance will determine whether Respondent met the requirements in this Remedy for the 2018 Christmas bonus, which allegedly it has paid to the employees.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reach, embody the understanding in a signed agreement:

> All office, skilled office and maintenance employees and employees used to perform repairs at Respondent's building in its place of business at Hato Rey, or any other place on the Island of Puerto Rico, including Playa Santa del Caribe; excluding all professionals, executives, administrators, the executive director's driver, confidential employees, guards and supervisors as defined in the Act, the secretaries for the executive director, the secretary of the assistant executive director, the secretary for the director of finance, the secretary of the planning and budget director, the secretary of the personnel and industrial relations director, the secretary of the legal affairs office director, a secretary for each assistant to the executive director up to a maximum of four secretaries, a secretary for each division by which the executive director carries out his functions, up to a maximum of four secretaries, the auditor's secretary and the secretary of the regional services director.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit.

(c) Resume giving unit employees Christmas bonuses and maintain it in effect until an agreement is reach with the Union or a lawful impasse in negotiations occurs.

(d) Make whole employees in the above-described unit for any losses and other benefits suffered as a result of the unlawful unilateral changes in Christmas bonuses in the manner set forth in the Remedy section of the decision.

(e) Make whole unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each employee.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a designed by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such record if stores in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its San Juan, Puerto Rico facility copies of the attached not marked "Appendix."[9] The posting shall be in English, Spanish, and any other language that the Regional Director finds applicable. Copies of the notice, on forms provided by the Regional Director for Region 12, after being

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In additional to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if Respondent customarily communicates with employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since September 30, 2016.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated Washington, D.C., November 6, 2019

Sharon Levinson Steckler
Administrative Law Judge

Appendix

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government
The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail to bargain with Union Internacional de Trabajadores de la Industria de Automoviles, Aeroespacio e Implementos Agricolas, U.A.W., Local 1850 as the exclusive collective-bargaining representative of the employees in the following unit:

> All office, skilled office and maintenance employees and employees used to perform repairs at Respondent's building in its place of business at Hato Rey, or any other place on the Island of Puerto Rico, including Playa Santa del Caribe; excluding all professionals, executives, administrators, the executive director's driver, confidential employees, guards and supervisors as defined in the Act, , the secretaries for the executive director, the secretary of the assistant executive director, the secretary for the director of finance, the secretary of the planning and budget director, the secretary of the personnel and industrial relations director, the secretary of the legal affairs office director, a secretary for each assistant to the executive director up to a maximum of four secretaries, a secretary for each division by which the executive director carries out his functions, up to a maximum of four secretaries, the auditor's secretary and the secretary of the regional services director.

WE WILL NOT unilaterally change terms and conditions of employment of our unit employees, including the Christmas bonus contained in the expired 2013-2017 collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours or other terms and conditions of employment of bargaining unit employees, notify and, upon request, bargain with the Union as the exclusive representative of our employees in the appropriate unit.

WE WILL resume giving unit employees the Christmas bonus according to the terms of the most recent collective-bargaining agreement that expired June 30, 2017, and WE WILL maintain it in effect until an agreement has been reached with the Union or a lawful impasse in negotiations occurs.

WE WILL pay each unit employee the difference between the full Christmas bonuses due in 2017 and 2018 under the collective-bargaining agreement and the bonus amount actually paid, with interest, as set forth in the Remedy section of this decision.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year for each bargaining-unit employee.

ASOCIACION DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO
(Employer)

Dated_____By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov

South Trust Plaza, 201 East Kennedy Boulevard, Ste 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-218502 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2345.